Supreme Court, U.S.
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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May a state agency refuse to enforce state wage-and-hour law for union workers because they exercise their federally-protected right to bargain collectively, under *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the District Court is reported at 749 F.Supp. 1526, and appears at pages 22a to 50a of the Appendix to the petition for a writ of certiorari (Pet. App. 22a-50a). The decision of the Court of Appeals is reported at 943 F.2d 1140. On March 8, 1993, the Court of Appeals filed an order adding a footnote to its earlier opinion and denying Livadas's petition for rehearing. Pet. App. 51a-53a. The Court of Appeals' final amended opinion is reported at 987 F.2d 552 and is reprinted at Pet. App. 1a-21a.

JURISDICTION

The Court of Appeals filed its amended opinion, along with an order denying Livadas's timely petition for rehearing, on March 8, 1993. The petition for a writ of certiorari was filed on June 3, 1993. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes will be set out in relevant part in the appendix to this brief: Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. §157; Sections 203(d) and 301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. §§173(d) and 185(a); 42 U.S.C. §1983; Cal.Code Civ.Pro. §§1084, 1085 (West 1989); Cal.Lab.Code §§90.5(a), 98(a), 98.3(a), 201, 203 and 229 (West 1989).

STATEMENT OF THE CASE

A. Facts

The California Labor Commissioner, head of the Division of Labor Standards Enforcement (DLSE), is charged with enforcing the state Labor Code on behalf of employees who "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal.Lab.Code §98.3(a). The California Labor Code imposes a number of wage-and-hour regulations on employers in the state; for example, the Labor Code requires employers to give employees their final paycheck immediately on termination, with daily penalties for any delay. Cal.Lab.Code §§201 and 203. The policy of the DLSE is to enforce these regulations for all employees except those covered by a collective bargaining agreement with grievance arbitration. Pet. App. 25a, J.A. 20.

Petitioner Karen Livadas is a grocery clerk. She is a member of Local 373, United Food and Commercial Workers, AFL-CIO. At all material times, her employment with Safeway Stores was governed by a collective bargaining

agreement through Local 373. Her union contract contained a provision for arbitration of any grievances alleging violations of the agreement. J.A. 11. Virtually all union contracts provide for grievance arbitration, as the Court noted in *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 411 n.11 (1988).

Livadas worked at Safeway Stores in Napa County, California until she was fired on January 2, 1990. *See* Pet. App. 2a. On that day, she demanded all pay due her. Her store manager told Livadas that Safeway would mail her a check instead. She received her final paycheck on January 5, 1990. *Id.*

On January 9, 1990, Livadas applied to the local office of the DLSE to enforce Cal.Lab.Code §§201 and 203 against Safeway for its three-day delay in her final wage payment. Livadas was given a one-page DLSE form entitled "Initial Report or Claim." J.A. 18. This standardized intake form asks applicants, among other questions, "Was your job union?" Livadas checked the box "Yes." *Id.* Livadas specified that she did not dispute the amount of her final paycheck, but only claimed late penalties for the three-day delay in payment. *Id.*

The Division's only response to Livadas's complaint was a form letter dated February 7, 1990. J.A. 16-17. The Division's February 7, 1990 letter reads in full:

> This letter is in response to the wage matter you recently filed against Safeway Stores claiming a penalty pursuant to Labor Code Section 203 in that you did not receive payment of your final wages on the day of discharge.
>
> It is our understanding that the employees working for Safeway Stores are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective

bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

Therefore, we are unable to proceed on your claim for penalties and are closing our file. We are sorry we could not be of further assistance to you.

J.A. 16-17. Aside from its stated "understanding" that Safeway employees had a standard union contract, the Division's letter did not refer to any particular term of Livadas's union contract.[1] The letter reflects the Division's policy prohibiting enforcement of any claim for late penalties where there exists a union contract with an arbitration clause, on the ground that such a claim would always require the application of a collectively bargained wage rate. *See* Pet. App. 25a, J.A. 20.

No hearing was ever held on Livadas's Labor Code charge. Safeway Stores was never required to appear or plead defenses to Livadas's complaint.

B. Proceedings Below

Livadas brought this action against the Labor Commissioner under 42 U.S.C. §1983, seeking declaratory and injunctive relief against the DLSE's policy of excluding workers with union contracts from the enforcement of the state Labor Code. Livadas contends that the Commissioner's policy impermissibly penalizes union workers in California for exercising their federal right to organize and bargain collectively, a right protected from state interference by §7 of the National Labor Relations Act (NLRA), 29 U.S.C. §157, under *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989) (*Golden State I* and *II*).

[1] Nothing in the record indicates that the Division even had a copy of Livadas's union contract when it refused to take further action on her complaint. Livadas's union contract was apparently not in the agency's file when this litigation commenced; counsel for the Division had to refer to a copy of this agreement obtained from Livadas's counsel after this action was filed. *See* J.A. 1, para. 6.

The Commissioner argues that his agency excludes workers covered by standard union contracts[2] under the compulsion of a 1975 state court injunction, *Plumbing, Heating and Piping Employers Council* v. *Howard*, 53 Cal.App.3d 828, 126 Cal.Rptr. 406 (Cal.Ct.App. 1975). The Commissioner justifies this policy disqualifying union workers by citing Cal.Lab.Code §229, which prohibits the Commissioner from intervening in "any dispute concerning the interpretation or application of any collective bargaining agreement containing . . . an arbitration agreement." On this basis, Livadas and the Commissioner submitted the case on cross-motions for summary judgment.

The District Court (Henderson, J.) granted Livadas's motion for summary judgment. The District Court held that Cal.Lab.Code §§201 and 203 are minimum standards of employment that do not require interpretation of a worker's union contract and are therefore not preempted by §301 of the LMRA, following *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 747-58 (1985), *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21-22 (1987) and *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 403-11 (1988). Pet. App. 40a-48a. The District Court held that the Commissioner's policy of refusing to enforce these wage-and-hour regulations for union workers imposes an impermissible penalty on their NLRA-protected activity. Pet. App. 27a-39a. Following *Golden State I*, the District Court issued a state-wide injunction ordering the Commissioner "to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." Pet. App. 49a.

[2] Federal law recognizes an arbitration clause as a standard element found in virtually all collective bargaining agreements. *See Lingle*, 486 U.S. at 411 n. 11. Under federal law, grievance arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers* v. *Warrior & Gulf Navigation*, 363 U.S. 574, 578 (1960).

After an expedited appeal, a divided Ninth Circuit panel reversed. The panel majority (Rymer, J.; Alarcon, J. concurring) declined to decide whether Cal.Lab.Code §§201 and 203 are actually preempted by federal labor law. Instead, the Court of Appeals emphasized that the Commissioner's exclusion policy is based on Cal.Lab.Code §229, a "perfectly valid" state labor preemption statute. The panel majority reasoned that even if the Commissioner's application of this state statute is wrong, his resulting "erroneous eligibility determination" is, at most, an error of state law for which federal law provides no remedy. Pet. App. 12a. The Ninth Circuit acknowledged that, "by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to get an erroneous eligibility determination" than non-union workers, but the Court of Appeals reasoned that this result is simply "a function of the complexity of preemption law and the inherent tension between federal and state systems for adjudicating labor disputes." Pet. App. 12a-13a. The panel majority concluded: "[W]e believe that Congress would not want state officials erring on the side of adjudicating labor disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a [union contract]." Pet. App. 14a.

In dissent, Judge Kozinski protested that anti-union discrimination violates federal rights, whatever the Commissioner's motives. Despite the Commissioner's belief that he is complying with state labor preemption law, the fact remains that "the only employees excluded as a class are those who exercise their federal labor rights." Pet. App. 20a. According to Judge Kozinski, "[w]e can't duck the question whether such federal law renders such discrimination impermissible." Pet. App. 17a.

Judge Kozinski accused the majority of obscuring this discrimination by "seek[ing] refuge in a novel doctrine of quasi-preemption," under which state officials should refuse enforcement to union workers "by virtue of certain penumbras and emanations radiating from the body of federal labor law." Pet. App. 17a. Judge Kozinski insisted that it is inappropriate for courts "to guess at what Congress 'presumably' would have wanted," and he warned that the majority's divination of "some preemptive corona surrounding the federal labor laws" would nullify this Court's efforts to clarify what is *not* preempted.[3] Pet. App. 18a.

This Court granted certiorari on January 21, 1994.

SUMMARY OF ARGUMENT

At its heart, this is a simple case. Petitioner Karen Livadas has exercised the core rights secured to employees under the National Labor Relations Act to engage in collective bargaining and have a collective bargaining agreement providing for arbitration. Respondent, the Labor Commissioner for the State of California, has a policy that anyone who has exercised these rights is denied his services in enforcing Cal.Lab.Code §§201 and 203, which require employers to pay employees their accrued wages upon termination or be liable for a penalty. The Labor Commissioner's enforcement services are otherwise generally available to California employees. *See* Cal.Lab.Code §98.3(a).

This is a clear deprivation of federal rights secured by the NLRA, redressible under §1983. The Commissioner has required, as a condition for his services in enforcing state-law

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[3] Two academic commentators have already criticized the Court of Appeals' decision and applauded Judge Kozinski's dissent. *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 618-20 (1992); Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 Hastings L.J. 131, 156-58 (1992).

minimum labor standards, that employees in California refrain from exercising their rights under the NLRA. Under *Golden State II*, the Commissioner's policy is not only preempted because it penalizes conduct which is protected by the NLRA, but it is also subject to remedy under §1983.

The Commissioner's defense and the decision of the Court of Appeals are based on notions of §301 preemption that are foreclosed by this Court's decisions. The Court of Appeals held that state officials like the Commissioner should not enforce state minimum labor standards laws when it is even arguable that enforcement may involve a union contract providing for grievance arbitration. Pet. App. 14a. This Court's decisions in *Metropolitan Life* and *Fort Halifax*, decisions that the Court of Appeals majority did not acknowledge, hold the opposite. The Commissioner and the Court of Appeals believed that Livadas's claim under §§201 and 203 was preempted by §301 of the LMRA, because the late penalty Livadas was entitled to under state law was measured by her rate of pay established by the collective bargaining agreement. This Court has made it clear that a state- law claim is not preempted by §301 of the LMRA simply because the state court must obtain a datum such as rate of pay from a collective bargaining agreement. *See Lingle*, 486 U.S. at 413 n. 12.

The Court of Appeals also supported its conclusion that Livadas had no §1983 claim by inventing a new principle not previously found in the jurisprudence of either labor law preemption or §1983. The Court of Appeals held that there is no deprivation of federally-secured rights remediable under §1983 if the state acts pursuant to a statute which is facially valid. Pet. App. 12a. The law is exactly the opposite. What matters is whether the conduct is protected by federal law, not whether the state law considered apart from its application is valid. *See Monroe* v. *Pape*, 365 U.S. 167, 172-176 (1961) (overruled in part not relevant here, *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 664-689 (1978)); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971).

Finally, the Court of Appeals was of the view that instead of exercising §1983 jurisdiction to protect Livadas's federal rights from deprivation, the District Court should have relegated Livadas to state court to seek the extraordinary writ of mandamus against the Commissioner. The Court has instructed the federal courts not to abstain in these circumstances. *See New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 364-73 (1989). There is no reason why the federal courts should stay out of a case where a state agency is systematically penalizing the exercise of federal rights because of false notions of NLRA preemption, and where there have been no formal proceedings under state law.

This Court should reverse the Court of Appeals' decision, and reinstate the District Court's injunction prohibiting the Commissioner from refusing to enforce Cal.Lab.Code §§201 and 203 on the basis of a claimant's coverage under a collective bargaining agreement with an arbitration clause.

ARGUMENT

I. THE COMMISSIONER ADMITTEDLY HAS A POLICY OF NOT ENFORCING THE CALIFORNIA LABOR CODE ON BEHALF OF EMPLOYEES COVERED BY COLLECTIVE BARGAINING AGREEMENTS CONTAINING ARBITRATION CLAUSES

A. The Commissioner's Judicial Admissions

The Labor Commissioner has lately made a decisive concession:

> There's little doubt, based upon a fair reading of current caselaw, that if the refusal to prosecute Livadas's claim was simply based upon her status as an employee covered by a collective bargaining agreement containing an arbitration clause, the Labor Commissioner's actions would be preempted by the federal law.
>
> (Supp. Brief by Respondent In Reply To Brief For the United States as Amicus Curiae, at 2).

Significantly, the Commissioner now concedes that it is a violation of federal law for a state to deny its services to a person simply because the person is covered by a collective bargaining agreement with an arbitration clause. All that is left of the Commissioner's position is that his agency does not have such a policy, *cf. id.* at 5-6; otherwise, the deprivation of federal rights is admitted.

The record contradicts the Commissioner's current disavowal of his agency's policy. As the District Court summarized the Commissioner's position, "[b]oth of the parties agree that the policy of the DLSE is to enforce Labor Code §§201 and 203 for all employees except for those whose work is governed by CBA's containing binding arbitration clauses." Pet. App. 25a. The Commissioner repeatedly and explicitly articulated this exclusion policy below:

> The California courts have affirmed the construction of Labor Code Section 229 as stating a policy prohibiting the Labor Commissioner from hearing and enforcing wage claims where there exists a collective bargaining agreement which contains an arbitration clause. . . .

Defendant's Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, J.A. 19. *See generally* J.A. 19-21.

After the District Court's judgment, the Commissioner moved to stay the injunction on the ground that the order "will have an enormous effect on the enforcement policies and practices of DLSE which since 1975 has been enjoined from hearing and enforcing claims for penalty wages under Labor Code Section 203. . . ." Decl. of James H. Curry, para. 6, J.A. 31. In the Court of Appeals, the Commissioner defined the following "Statement of Issues" in his appeal:

> 2. Whether the District Court erred in ruling that this State's policy which precludes enforcement action by the Labor Commissioner of claims under California Labor Code Sections 201 and 203 where there exists a collective bargaining agreement containing an arbitration clause infringes upon Plaintiff-Appellee's NLRA-based right to work under a collective bargaining agreement containing an arbitration clause.

Appellant's Opening Brief, J.A. 34-35. In his reply brief in the Court of Appeals, the Commissioner repeated:

> As Commissioner has pointed out, however, the enforcement policy looks simply at whether there is a collective bargaining agreement and whether that contract contains an agreement to arbitrate.

J.A. 36. Similar admissions were made in other pleadings below.[4]

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[4] Memorandum of Points and Authorities in Support of Motion to Join Additional Party Defendants, Docket No. 7, pp. 11-12; Defendant's Points and Authorities in Support of Motion Stay Pending Appeal, Docket No. 55, pp. 3, 5, 7-8.

B. The Commissioner Refused Livadas's Claim Pursuant To This Policy

The Commissioner's enforcement policy was also explained in his agency's February 7, 1990 letter refusing to take further action on Livadas's complaint. J.A. 16-17. According to the agency's no-action letter, the rate of pay necessary to calculate the amount of any statutory late penalty would have to be derived from Livadas's collective bargaining agreement, a reference that the agency regards as a prohibited application of the terms of such an agreement. J.A. 16. The Commissioner's rationale applies uniformly to any claimant covered by a collective bargaining agreement with grievance arbitration, no matter what particular substantive provisions that agreement contains. The Commissioner admitted below that the February 7, 1990 no-action letter was the direct result of the Commissioner's statewide exclusion policy:

> The letter sent to Plaintiff by DLSE dated February 7, 1990 . . . specifically states the basis for the Commissioner's action regarding her claim and reveals that DLSE's action was taken pursuant to the above-stated policy. . . .
>
> The policy of the DLSE relies on the presence or absence of an arbitration clause in a collective bargaining agreement.

J.A. 20. In refusing further action on Livadas's charge, the DLSE did not refer to any particular provision of her union contract. The simple fact that she was covered by a collective bargaining agreement with grievance arbitration was a sufficient reason to exclude her, according to the agency's stated rule of enforcement.

II. THE COMMISSIONER'S POLICY IS PREEMPTED BY FEDERAL LABOR LAW

A. The Commissioner's Policy Is In Direct, Actual Conflict With The NLRA

There can be little question that the Commissioner's treatment of Livadas's claim was preempted by federal law. There

is a direct, actual conflict between Livadas's rights under the NLRA and the Commissioner's refusal to take her claim because she exercised those rights.

> If employee conduct is protected under §7, then state law which interferes with the exercise of these federally-protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause.
>
> * * *
>
> [i]f the state law regulates conduct that is actually protected by federal law, . . . preemption follows . . . as a matter of substantive right.

Brown v. *Hotel Employees*, 468 U.S. 491, 501, 503 (1984). *See also Bus Employees* v. *Missouri*, 374 U.S. 74, 81-82 (1963); *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391 (1951); *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 458-459 (1950). This Court has held specifically that a state may not refuse minimal state-law employment rights, such as unemployment insurance benefits, to employees because they exercise rights under the NLRA. *See Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967) ("Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan.")

B. If The Commissioner's Policy Were Not Directly Preempted, It Would Be Preempted Under The *Machinists* Doctrine

Even if the Commissioner's policy were not directly preempted because of their conflict with Livadas's explicit Section 7 rights, it would still be preempted as a state-law interference with the collective bargaining process under *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). "[T]he Act and the National Labor Relations Board were intended to facilitate bargaining between the parties." *Golden State Transit Corp.* v. *Los Angeles*, 475

U.S. 608, 617 (1986). "'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Id.*, at 619, quoting *New York Tel. Co.* v. *New York Labor Depart.*, 440 U.S. 519, at 551 (1979) (Powell, J., dissenting). As Judge Kozinski recognized, the Commissioner's discrimination against union members because they have chosen to exercise their NLRA rights inevitably burdens the collective bargaining process.

> It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." In a closely fought election, this type of argument might make a difference.

Pet. App. 21a n.2.[5] That is not all. The effect of the Commissioner's policy is certainly felt by already-unionized employees, like Livadas herself. They have an ongoing choice whether to continue with collective bargaining. *See* NLRA §9(c)(1)(A)(ii), 29 U.S.C. §159(c)(1)(A)(ii). The Commissioner's abandonment will influence the decision whether to retain collective bargaining and grievance arbitration as much as it will the initial decision to select a collective bargaining representative. Since the purpose of the NLRA is to facilitate collective bargaining, and the Commissioner's policy inevitably discourages it, *Machinists* preemption applies here, too.

[5] This scenario is realistic. Employers combatting union organizing drives may lawfully warn employees that the employer will bargain from scratch, and that all existing benefits may be discontinued as a result of collective bargaining. *See Clark Equipment Co.*, 278 NLRB 498, 499 (1986).

III. LIVADAS IS ENTITLED TO A REMEDY UNDER §1983 BECAUSE THE COMMISSIONER'S POLICY DEPRIVED HER OF HER RIGHTS TO COLLECTIVE BARGAINING UNDER NLRA

A. Elements Of A §1983 Cause Of Action

The fact that preemption exists, however, does not necessarily mean that there is a §1983 claim.

> Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to §1983 exists every time a federal rule of law pre-empts state regulatory authority.

Golden State II, 493 U.S. at 107-108. Put another way, an attempt to enforce a preempted state law does not necessarily mean that the person against whom enforcement is sought is thereby deprived of a federally protected right.[6]

To establish the availability of §1983 to remedy a governmental violation of federal statutory rights, a plaintiff must assert the violation of a statutory right, an inquiry subdivided into questions (a) whether the asserted statutory right creates an obligation binding on the governmental unit, as opposed to being no more than a congressional preference for certain kinds of treatment, (b) whether the asserted right is so vague and amorphous that it is beyond the competence of

[6] For instance, in *Wisconsin Dept. of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), the State sought to punish an employer for the commission of unfair labor practices under federal law. The state law was held to be preempted, and the employer was protected from the law's operation. But the employer would have no remedy under §1983 because it had no federally protected *right* to commit unfair labor practices or even to be free from additional punishment for them. The purpose of preemption in *Gould* was not to benefit the wrongdoer but to preserve uniformity in the enforcement of federal labor law. *See id.* at 286-89.

the judiciary to enforce, and (c) whether the right was intended to benefit the petitioner. *See Golden State II*, 493 U.S. at 106.[7]

Golden State II has answered the first question. The rights conferred by the NLRA on employees are secured to them against interference by the States, as well as by employers and labor organizations. *Id.*, 493 U.S. at 111-12. The remaining questions in this case, therefore, are whether the rights Livadas asserts are ascertainable and whether she is their intended beneficiary. The answer to both questions is clearly yes. Indeed, none of the opinions below, including that of the Court of Appeals majority, expressed any doubt that §1983 is available to Livadas. *See* Pet. App. 7a, 21a, 32a.

B. The Commissioner's Policy Deprives California Workers Such As Livadas Of Rights Under The NLRA Which Are Ascertainable And Of Which They Are The Intended Beneficiaries

1. Three Rights: To Select A Collective Representative; To Bargain Through That Representative; And To Bargain For Arbitration

The Labor Commissioner's policy requires California workers to give up three separate rights as a condition to enjoying the Commissioner's services in enforcing Cal.Lab.Code §§201 and 203. Each of these rights is expressed in the words of the Act, and is central to its concerns. The first is the right to decide whether to have a collective bargaining representative. The second is the right to have a collective bargaining agreement negotiated by that representative. The third is the right to negotiate arbitration as the means of resolving disputes under the agreement.[8] These are "nestled" rights: employees cannot have arbitration of their grievances under the collective bargaining agreement unless they have negotiated such an agreement, which requires in turn that they have exercised their right to select a representative. Refusing state services because there is arbitration in a collective bargaining agreement necessarily deprives them of their right to select a representative and negotiate an agreement through that representative; the exercise of both these rights is the *sine qua non* of arbitration.

[7] A defendant may overcome this showing by demonstrating that Congress specifically foreclosed a remedy under §1983, *see Golden State II*, 493 U.S. at 106-107, but the Court held that this is not possible with respect to the NLRA because its comprehensive remedial scheme only addresses the actions of employers and labor organizations, not those of state and local governments. *See id.* at 111-12.

a. Selection Of A Representative And Bargaining

The Commissioner has argued that employees are not the intended beneficiaries of these rights under the NLRA, but that only employers and unions are. There is nothing to this argument, and it was rejected by both of the courts below. *See* Pet. App. 4a-7a, (Court of Appeals majority), 21a (Kozinski, J., dissenting), 27a-32a (District Court). The NLRA, and particularly the core statutory rights affected here, were primarily intended for the benefit of employees and less so for unions and employers.

Starting with Section 1 ("Findings and Policies") the focus of the NLRA is on securing to employees the right to organize and bargain collectively.

> The denial by some employers of the *right of employees to organize* and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. . . .

[8] This is a clearer case for the application of federal preemption than *Golden State* itself. Here, the rights deprived are expressly guaranteed by the words of the statute. By contrast, Golden State Transit's implied immunity from regulation under the *Machinists* preemption doctrine was so unclear that the District Court and the Court of Appeals did not believe it existed. *See Golden State I*, 475 U.S. at 612. Moreover, in *Golden State II*, even though the immunity had been found to exist, the difficult question was presented whether the NLRA secured it to the employer.

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce. . . .
>
> Experience has proved that protection by law of the *right of employees to organize and bargain collectively* safeguards commerce from injury. . . .
>
> 29 U.S.C. §151, emphasis added.

Section 7, entitled "Rights of Employees," provides:

> *Employees* shall have the *right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

29 U.S.C. §157, emphasis added. Section 9 provides for the selection by employees of collective bargaining representatives, and in subsection 9(b), the National Labor Relations Board is instructed "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." 29 U.S.C. §159. The NLRA plainly refers to employees as the primary beneficiaries of the statutory provisions.

b. The Particularly Important And Favored Right To Negotiate Arbitration

One of the most common exercises of employees' Section 7 rights to engage in collective bargaining is the negotiation of an agreement to arbitrate contractual disputes. Unquestionably, arbitration is the product of collective bargaining and nothing else; unless there is a collective bargaining agreement in effect providing for it, there is no obligation to arbitrate. *Litton Financial Printing* v. *NLRB*, 501 U.S. 190, 111 S.Ct.

2215, 2227 (1991). Although it is consensual, it is greatly encouraged by federal labor policy[9]. *See* Labor Management Relations Act, §203(d), 29 U.S.C. §173(d). This Court has said:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. [footnote and citations omitted]. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. [footnote omitted].

Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

The Commissioner argues that his policy of refusing enforcement of Cal.Lab.Code §§201 and 203 somehow facilitates the federal policy favoring arbitration. This argument misses the point. Under federal law, labor arbitrators may only enforce rights arising under the union contract, not rights created by external law. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

Livadas would be unable to claim her statutory late penalties through a contract grievance, because her union contract does not provide for immediate wage payment on termination or for penalties for late payment. *See* Pet. App. 42a. In the event that an arbitrator did try to award a remedy for Livadas's statutory claim under Cal.Lab.Code §§201 and 203, the award would be swiftly vacated in federal court as outside the arbitrator's authority. *See Steelworkers* v. *Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960). By disqualifying union workers from Labor Code enforcement, the Commissioner is not protecting the arbitration of contractual grievances; he is penalizing workers for negotiating union contracts in the first place.

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[9] So forceful is the policy in favor of arbitration that a no-strike obligation will be inferred, even when it is not expressly stated, from the existence of the agreement to arbitrate. *See Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 386-88 (1974); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

This policy is a disincentive for employees to support their representatives' agreement to arbitration. They give up not only what they intended to exchange, the right to strike, *see Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), but also their rights to minimum labor standards provided under state law. This Court has been careful to remove disincentives to agreements to arbitrate.[10] It should remove this disincentive for the same reason.

2. These Rights Are Secured To Employees By The NLRA, Not Just To Unions and Employers

This Court's previous decisions show that NLRA rights, including the right to negotiate, belong to employees as well as employers and unions. Employees have the right, even though they have not selected an exclusive representative, to collectively demand changes in their terms and conditions of employment. *NLRB* v. *Washington Aluminum*, 370 U.S. 9, 14 (1962). *Washington Aluminum* establishes that employees do not need a labor organization to engage in collective bargaining; so it cannot be said that they have no personal rights secured by the NLRA. *See also NLRB* v. *Magnavox Co.*, 415 U.S. 322, 326 (1974) (Section 7 rights of employees to solicit each other about whether to have a bargaining representative may not be waived by their union, even if the waiver were limited to workers supporting the union, "[f]or employees supporting the union have as secure §7 rights as those in opposition."); *Brown* v. *Hotel Employees*, 468 U.S. at 503 ("Section 7 guarantees *to employees* various rights, among them the right 'to bargain collectively through representatives of their own choosing.'") (emphasis added); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972) (the

[10] "Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970). This point was relied upon by the Court in *Gateway Coal*, 414 U.S. at 382.

Section 7 "guarantee includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves.").

The Commissioner has relied on *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975) to support his view that only employers and labor organizations have rights secured by the NLRA. This case is beside the point. In *Emporium Capwell*, a group of employees was denied the protection of the NLRA for its effort to compel the employer to bargain with it on the issue of racial discrimination, separate from the exclusive collective bargaining representative. Here, all Livadas did was to have an exclusive collective bargaining agent and have a collective bargaining agreement including arbitration negotiated through her union. The Commissioner refused to help her with her claim because of these things she did in concert with her fellow employees, not because of any individual action she took. When she sought late-payment penalties under the Labor Code, she did not seek to circumvent her bargaining agent; she was simply claiming the benefit of the State's minimum labor standards.

The Commissioner conditioned Livadas's access to his enforcement services on her not having exercised her NLRA rights to select a representative and bargain through that representative for a contract containing arbitration, pursuant to his established policy not to take claims on behalf of *any* employees covered by collective bargaining agreements with arbitration clauses. This was a deprivation of Livadas's NLRA rights, which the Court of Appeals should have permitted the District Court to remedy under §1983. Instead, it found reasons why nothing should be done for Livadas under §1983; the reasons are fully at odds with NLRA and §1983 law.

IV. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT CAL.LAB.CODE §§201 AND 203 ARE MINIMUM LABOR STANDARDS WHICH THE COMMISSIONER IS NOT PREEMPTED FROM ENFORCING

A. *Metropolitan Life* and *Fort Halifax* Hold that Substantive Employment Laws Such As Cal.Lab.Code §§201 and 203 Are Not Preempted

Labor Code §§201 and 203 are part of the minimal labor standards established by the State of California. The Court has held that such minimal labor standards are not preempted under *Machinists* analysis, *see Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. at 753-758, or under the pre-emption analysis in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *see Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. at 22 n. 16. The Court pointed out that the NLRA was enacted against the backdrop of myriad state laws setting minimum labor standards. *See Metropolitan Life*, 471 U.S. at 756. Cal.Lab.Code §§201 and 203 were among the laws "then in existence" when the NLRA was passed[11]. The purpose of the NLRA is to provide for the process of collective bargaining, not to legislate its substantive results. The Court concluded that Congress intended that the substantive employment law of the States would continue in effect. *Id.*, 471 U.S. at 755-56.

[11] The predecessor to §201 was enacted in 1911. It provided that a discharged employee must be paid all accrued wages immediately. Violation was a misdemeanor, punishable by a fine not to exceed $500. 1911 Statutes of California, ch. 663, pp. 1268-1269. In 1915, the predecessor to §203 was added, providing a penalty measured by the employer's length of delay. 1915 Statutes of California, ch. 143, p. 299. In 1919, the law was further amended. The provisions for immediate payment of discharged employees and for penalties when payment is delayed were reenacted, and among other things, a new provision was added providing, "It shall be the duty of the commissioner of the bureau of labor statistics to inquire diligently for any violations of this act, and to institute the actions for penalties herein provided, and to enforce generally the provisions of the act." 1919 Statutes of California, ch. 202, pp. 294, 296.

The persisting state law provides both protections for employees, *cf. id.*, as well as the employer's general right to run the workplace as it wishes, *see Fort Halifax*, 482 U.S. at 21. These "[m]inimum state labor standards affect union and non-union employees equally, and neither encourage or discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life*, 471 U.S. at 755. "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. " *Id.* at 757. "Furthermore, pre-emption should not be lightly inferred in this area since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax*, 482 U.S. at 21. *Accord*, *Lingle*, 486 U.S. at 412.

It cannot be questioned that Cal.Lab.Code §§201 and 203, and §98, for that matter, are minimum labor standards within the meaning of *Metropolitan Life* and *Fort Halifax*. These statutory provisions fit in this category at least as well as the legislation involved in those other cases. In *Metropolitan Life*, collectively-bargained health insurance plans were required to have certain mental health benefits prescribed by the State. Thus, the content of the employees' health plan became a mix of what state law required and what the parties bargained. The Court found that the state law was not preempted by federal labor law. *Id.*, 471 U.S. at 758. In *Fort Halifax*, the Court held that Maine's plant-closing law was a minimum labor standard and therefore not preempted by the NLRA, even though the Maine law had an explicit cognizance of the collective bargaining process, and provided that the statutory provisions could be superseded by a collectively-bargained alternative. *Id.*, 482 U.S. at 21. In both those cases, then, there was far more involvement or entanglement between state law and the collective bargaining process than there is here. By contrast, Cal.Lab.Code §§201 and 203 operate in total independence from the collective bargaining process. They do not intrude substantive terms into an area commonly dealt with in collective bargaining, as in *Metropolitan Life*, and they are not conditioned on what happens in

collective bargaining, as in *Fort Halifax*. Instead, they are employee protection statutes, minimum labor standards, in the purest sense. They simply provide that when an employee loses gainful employment and faces the world without income, at least she will receive immediately what she earned up to that time. These statutes are "a valid and unexceptional exercise of the [State's] police power." *Cf. Metropolitan Life*, 471 U.S. at 758.

B. The Court Of Appeals' Decision That The Commissioner Should Not Enforce State Minimal Labor Standards Violates This Court's Teachings

The decision of the Court of Appeals is completely contrary to *Metropolitan Life* and *Fort Halifax*. If generally followed, it would make those decisions into museum pieces, because what was not preempted under *Machinists* or *Garmon* would be preempted under §301. If state minimum employment standards are preempted solely because a collective bargaining agreement providing for arbitration exists, then these minimum standards laws will be preempted for most union workers most of the time. They would be eliminated almost as effectively as if the Court had held in *Metropolitan Life* and *Fort Halifax* that these laws were preempted under *Machinists* or *Garmon*. The rule in those cases would be limited to operation only when no agreement was in effect.

In *Metropolitan Life* and *Fort Halifax*, the Court spoke broadly about the absence of preemption. "[T]he mandated-benefit law as applied to a plan negotiated pursuant to a collective-bargaining agreement subject to the NLRA is not preempted by federal labor law." *Metropolitan Life*, 471 U.S. at 758. "[T]he Maine statute is not preempted by the NLRA." *Fort Halifax*, 482 U.S. at 22. Collective bargaining agreements were in effect in both cases. *See Metropolitan Life*, 471 U.S. at 748; *Fort Halifax*, 482 U.S. at 5. Nothing was said about §301 preemption, even to reserve any points about it. It apparently never occurred to anyone that these sweeping decisions could be largely nullified by this other branch of preemption analysis. There was no reason for this thought to

occur, either. In neither of these cases were the state laws dependent on interpretation of collective bargaining agreements. This is obviously so in *Metropolitan Life*. It may superficially appear less true in *Fort Halifax*, because the operation of the statute was affected by the result of collective bargaining. Still, no interpretation of the collective bargaining agreement was required in *Fort Halifax*. If the employee was covered by an express contract providing for severance pay, regardless of the terms, the statutory benefits were not payable. *See Fort Halifax*, 482 U.S. at 4 n.1. Section 301 preemption was therefore appropriately not an issue in that case. Here, in a case involving what is every bit as much a state minimum labor standard, the Court of Appeals majority elevated a non-issue into a rule that would swallow the Court's previous decision.

Moreover, the decision of the Court of Appeals not only defeats the holdings in *Metropolitan Life* and *Fort Halifax;* it is directly contrary to them. The Court of Appeals held that the Commissioner should not enforce a minimum labor standard such as that contained in Cal.Lab.Code §§201 and 203 if the claim "even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." Pet. App. 14a. This "theory of quasi-preemption," as Judge Kozinski characterized it, Pet. App. 18a, defies this Court's instruction in *Fort Halifax* that "preemption should not be lightly inferred in this area." *Fort Halifax*, 482 U.S. at 21. The Court of Appeals majority does not even appear to have realized that it was dealing with minimum labor standards, for it did not refer to either *Metropolitan Life* or *Fort Halifax* in the course of its opinion.[12] By reversing the Court's instruction in *Fort Halifax*, and adopting a presumption in favor of preemption of minimum labor standards claims instead of against it, the Court of Appeals majority created the inversion of logic and justice the Court warned against in *Metropolitan Life:*

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[12] Both the District Court and Judge Kozinski understood that Livadas's claim was in this category. *See* Pet. App. 45a-48a; 19a.

> It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employers.

471 U.S. at 756. That is exactly the inversion here. In California, employees who have chosen to exercise their Section 7 rights to join a union and negotiate a collective bargaining agreement containing arbitration are penalized by being deprived of the Commissioner's enforcement on their behalf of Cal.Lab.Code §§201 and 203.

The inversion of this Court's rulings by the Court of Appeals is all the more striking when it is remembered that the plaintiff in *Fort Halifax* was Maine's Director of the Bureau of Labor Standards, who had brought suit on behalf of the packing company's employees to recover for them the statutory plant-closing benefits. *See Fort Halifax*, 482 U.S. at 5. The benefits were measured by the employees' rates of pay, which were established by the collective bargaining agreement. *Id.* at 4 n.1. In the present case, Livadas sought to compel the Commissioner to do exactly what this Court approved in *Fort Halifax*, and the Court of Appeals majority held it was proper for the California Commissioner to *refuse* on preemption grounds. If this case had come up instead as an effort by the Commissioner to enforce Cal.Lab.Code §§201 and 203 on behalf of Livadas, and the employer had defended on grounds of preemption, *Fort Halifax* would have obviously been controlling in all respects; indeed, on the authority of *Fort Halifax*, the employer's argument would have been frivolous. This shows how extreme was the departure of the Court of Appeals from this Court's teachings, and how clear it is that there was no rational basis for thinking that an enforcement action by the Commissioner would be preempted—even arguably so.

V. THE COMMISSIONER'S POLICY IS NOT JUSTIFIED BY THE PRINCIPLES OF §301 PREEMPTION

A. Under *Lueck* and *Lingle*, Livadas's Claim Was Not Preempted

The only connection between Livadas's claim for late-payment penalties and the collective bargaining agreement was that the agreement provided her wage rate. J.A. 16-17. Moreover, there was never any question about the amount Livadas was owed. When she filed her claim on January 9, 1990, she stated that she had received her final pay check by mail at home on January 5. J.A. 18. She made it clear she was satisfied with the amount she was paid, and that her claim was only for penalties, because of the late payment. Under "amount due or balance claimed," she put, "Penalties only." *Id.* The last line of her "Brief Explanation Of Issues" was, "I am claiming penalties from 1/2/90-1/5/90." *Id.* Thus, Livadas's claim involved absolutely no interpretation or even mechanical application of the collective bargaining agreement. The amount of her final pay was never in question, only the time it was paid. As the District Court explained, "[i]t requires reference only to a calendar, not to the [union contract], to determine that the statute was violated and penalties are due." Pet. App. 41a.

The Commissioner refused to consider enforcing Livadas's claim, pursuant to his policy not to do so for employees covered by collective bargaining agreements with arbitration. He explained to Livadas that quantifying the amount of penalties due her would require looking in the agreement for her wage rate. J.A. 16.

However, "[n]ot every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by §301 or the provisions of the federal labor law." *Allis-Chalmers* v. *Lueck*, 471 U.S. 202, 211 (1985). Only "state law rights and obligations that *do not exist* independently of private agreements, and that as a result can be waived or altered by agreement of private parties,

are preempted by those agreements." *Id.* at 213 (emphasis added). The question is whether a claim is "inextricably intertwined" with the terms of the collective bargaining agreement. *Id.* at 213. No principle of federal labor law preemption stops the operation of state law merely because the employee who invokes it is covered by a collective bargaining agreement with arbitration or because that agreement contains data needed to calculate the amount of a claim. Section 301 preemption only precludes a state-law claim when its resolution is substantially dependent on an analysis of the collective bargaining agreement, *see id.*, 471 U.S. at 220, *not* every time interpretation or application of a collective bargaining agreement would be involved, and certainly not every time the collective bargaining agreement supplies data such as employees' wage rates. This Court has made this clear:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. [cit. om.] Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise preempted, would stand.

Lingle, 486 U.S. at 413 n. 12.

If the Commissioner were right that a claim is preempted simply because it is necessary to look at the collective bargaining agreement to find an employee's wage rate, then Congress has unknowingly made unionized employees legal pariahs. Any union member's tort claim—even against a tortfeasor who was a stranger to the collective bargaining agreement—would be preempted if lost wages were an element of damages. All state social welfare schemes where benefits are based on wages, such as workers' compensation

laws[13], would be preempted by §301. As a result, the Commissioner has not merely "misapprehend[ed] the precise location of the boundaries between state and federal power," *cf. Golden State II*, 493 U.S. at 114 (Kennedy, J. dissenting), but has adopted a policy affecting virtually all workers in California under collective bargaining agreements, which draws a line so far from the federal-state frontier that no reading of existing law could justify it.

The Court of Appeals imported into §301 preemption analysis an analog of the "arguably protected or prohibited" test under *Garmon*. Pet. App. 14a. This Court has never intimated that this is an appropriate method of applying §301 preemption. Indeed, just the opposite is evident from all of the Court's cases in this area. Section 301 preemption extends only so far as is necessary to insure that collective bargaining agreements are enforced in accordance with principles of federal law. It does not clear away any extra space around it. Otherwise, *Lingle* could not have been decided as it was. There, the employer argued that its actions were taken in accordance with rights given to it under the collective bargaining agreement. *See Lingle*, 486 U.S. at 401. Resolution of the employee's claim *arguably* would have involved some reference to the agreement. The same was true of the economic damages sought by the employee in *Lingle*, which would be measured by the pay rate in the agreement.

The Court of Appeals' "arguably preempted" test for preemption would therefore have produced a contrary result had it been applied in *Lingle*. Federal preemption under §301 cannot rely on such a vague principle, particularly where that principle defeats the purposes of federal law.

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[13] For example, California workers' compensation laws base an injured worker's benefits on wages, which would be derived from a collective bargaining agreement in the case of unionized workers. *See* Cal.Lab.Code §§4451 *et seq.* (West 1989).

B. The Commissioner Is Completely Mistaken In His View That The Existence Of An Arbitration Clause Somehow Makes A Difference For §301 Preemption

The Commissioner's misunderstanding of federal labor preemption runs deep. He argues that his policy would not prevent the agency from enforcing the rights of a worker under a collective bargaining agreement *without* an arbitration clause. Brief In Opposition, pp. 3-4. But §301 preemption applies where there is a collective bargaining agreement *regardless* of whether it has an arbitration clause. In *Lucas Flour*, the Court explained that the purpose of §301 preemption was not necessarily to promote arbitration, but to avoid "the possibility that individual contract terms might have different meanings under state and federal law." 369 U.S. at 103-04. The possibility of such conflicting interpretations "might substantially impede the parties' willingness to agree to contract terms providing for final arbitral *or judicial* resolution of disputes." *Id.* (emphasis added). *Accord, Lueck*, 471 U.S. at 210; *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421, 426, 429 n. 15 (1967) (if suit for violation of the collective bargaining agreement, which had no arbitration provision, has been brought in court instead of unfair labor practice charges being filed, the suit would have been governed by federal law); *Humphrey* v. *Moore*, 375 U.S. 335, 344, 345 n. 8 (1964) (federal law applies under §301 to interpret collective bargaining agreement, and interpreting scope of arbitration clause is for the courts, not the arbitrator); *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 23-28 (1962) (§301 governs strike settlement agreement with no arbitration clause). Section 301 preemption is not a matter of allocation of jurisdiction, but the choice of law to govern collective bargaining agreements. Both state and federal courts have jurisdiction under §301 but apply only federal law. *See Teamsters* v. *Lucas Flour*, 369 U.S. at 101-04. Sometimes the courts defer to arbitration, as in *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 264 (1962), but other times they do not. *See e.g.*, *Local Union No. 721, United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 252- 253 (1964) (employer's claim for damages for breach of no-strike clause).

This misunderstanding on DLSE's part shows that its policy is based on an unthinking fixation on the existence of an arbitration clause in a collective bargaining agreement, rather than sensitivity to federal labor preemption. By its own profession, it is apparently willing to interpret and apply collective bargaining agreements without limit as long as they do not contain an arbitration clause. As a practical matter, the fixation with arbitration wins out, because almost all collective bargaining agreements provide for arbitration.

C. It Is Not Too Hard For The Commissioner To Enforce The Labor Code For Employees Like Livadas While At The Same Time Following This Court's Guidance On The Limits Of §301 Preemption

Faced with his staff's perceived inability to properly apply federal labor law preemption principles, the Commissioner adopted a prophylactic, general rule that if the agency has to look to a collective bargaining agreement for *any* information, it will reject the employee's request for help. If he insisted on a rule that could be applied with no thought, he could as easily have chosen to seek enforcement of *all* claims by employees covered by collective bargaining agreements with arbitration—that is, treating them the same as all other employees without discrimination—and let the courts tell it which ones were preempted. This is the only acceptable course under §1983, *if* thoughtful application of §301 preemption doctrine is ruled out. The course the Commissioner has chosen penalizes employees like Livadas, whose claims are not preempted, because they have exercised their federal rights. The other course risks defeat on preemption grounds for some claims, but does not jeopardize federally-protected rights, inasmuch as there is no such right to be free from attempted enforcement of state minimum labor standards laws, as *Metropolitan*

Life and *Fort Halifax* show. As between two overly-broad courses, state and local officials must pick the one that does not injure federally-protected rights.[14]

Of course, nothing in the Court's decisions requires the Commissioner to adopt such drastic, overbroad policies. They allow him to think about these preemption questions. Some may be difficult, but most are simple, as this case demonstrates. Just reading *Lingle* should have been enough to reveal that all claims like that of Livadas were not preempted by §301. The same is true of late-payment claims where the lateness is undisputed but there is some question how much was due; *Lingle*, 486 U.S. at 413 fn. 12, describes how state agencies and courts should handle such claims. For whatever claims which may not fit into these categories, the Court has provided a test. A claim is preempted only if its existence, not its measurement, can only be resolved by interpreting the collective bargaining agreement; that is, that it is "inextricably intertwined," *Lueck*, 471 U.S. at 213, with the provisions of the collective bargaining agreement.

Thus, the dilemma the Commissioner fears is illusory. Employee rights under state minimum standards laws can be enforced without interfering with the uniform interpretation of collective bargaining agreements and without undue difficulty.

VI. IT IS NO DEFENSE THAT CAL.LAB.CODE §229 IS VALID ON ITS FACE

A. An Application Of A Valid Statute Which Deprives Federal Rights Is Remediable Under §1983

Another key misunderstanding by the Court of Appeals majority was that "a misinterpretation of a perfectly valid state statute, however, does not provide grounds for federal

[14] It just so happens that in choosing between Scylla and Charybdis, the policy adopted by the Commissioner favors the employer over the employee every time, despite the fact that the primary intended beneficiary of *both* the NLRA and Cal.Lab.Code §§201 and 203 is the employee.

relief." Pet. App. 12a. From this premise, the Court of Appeals reasoned that all the Livadas complained of was a misinterpretation of a valid statute, and therefore her only redress was to try to correct the misinterpretation by bringing an action in state court under state law.[15]

Section 1983 is not limited, however, to attacks on the facial validity of statutes. *See Monroe* v. *Pape*, 365 U.S. at 476-484; *Zinermon* v. *Burch*, 494 U.S. 113, 124-25 (1990). Section 1983 is available to correct the misinterpretation of state law by state officials, where the misinterpretation causes a deprivation of federal rights.

> There can be no doubt at least since *Ex Parte Virginia*, 100 U.S. 339, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of the State and represent it in some capacity, whether they act in accordance with their authority or misuse it. [citation omitted].

Monroe v. *Pape*, 365 U.S. at 171-172. "[I]n many cases there is 'no quarrel with the state laws on the books,' *Monroe* at 176; instead, the problem is the way those laws are or are not implemented by state officials." *Zinermon*, 494 U.S. at 125.

Federal labor preemption takes the same approach. Issues of preemption are not resolved by looking to see whether the state law in question is one that is general or special to labor relations. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U.S. at 292. *Accord*, *Wisconsin* v. *Gould*, 475 U.S. at 289.

[15] The Court of Appeals majority minimized the Labor Commissioner's action by suggesting that he merely guessed wrong on the question whether Livadas's claim was preempted. This is, however, exactly what the Los Angeles City Council did in *Golden State*. In a single instance involving a single entity, it withheld a government benefit, on the erroneous but honest belief that it had the power to do so. It guessed wrong on preemption, and for this had to pay damages. The guess was a much tougher one than here, where the preemption question has a clear answer.

In both *Monroe* v. *Pape* and *Zinermon*, §1983 was invoked to remedy official actions that were not in accord with valid state laws. In *Monroe* v. *Pape*, the state laws actually prohibited the officials' abuse of power.[16] *See* 365 U.S. at 183. In *Zinermon*, the officers did not violate state law, but violated federal civil rights in applying an otherwise valid statute. *See* 494 U.S. at 135-36.

There are many other examples. For instance, in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Court held that Maine's interpretation of a provision of federal law concerning Aid to Families with Dependent Children worked a deprivation of rights under that same law. There was no question of the validity of the law that state officials were applying, but only of the way they applied it. *Id.* at 3. In *Nash* v. *Florida Industrial Commission*, Florida had a provision in its unemployment compensation law that disqualified claimants unemployed due to a "labor dispute." *See* 389 U.S. at 236-37. The validity of the statutory disqualification provision itself was not in dispute. The administrative agency interpreted it, however, to disqualify a worker who filed an unfair labor practice charge with the NLRB over her discharge. *See id.* at 237. The Court held that "the Florida Unemployment Compensation Law *as here applied*" was preempted because the State penalized conduct protected by federal law. *Id.*, 389 U.S. at 240 (emphasis added). In *Golden State* itself, the Los Angeles City Council acted under the authority of a "perfectly valid" charter provision. The relevant section of the city charter provided:

> The city may, by ordinance, . . . grant to the holder of such franchise a new franchise to replace such franchise about to expire.

[16] But Section 1983 "does not draw any distinction between abusive and non-abusive federal violations." *Collins* v. *City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1065 (1992).

Golden State Transit Corp. v. *City of Los Angeles*, 686 F.2d 758, 760 (CA9 1982), *cert. denied*, 459 U.S. 1105 (1983), quoting Los Angeles City Charter §3, sub. div. 8(D). Nothing was wrong with the legislation, only with its application in a particular instance.

B. In Livadas's Case, The Commissioner Acted Pursuant To An Established—and Defective—Policy

Besides missing the point that §1983 applies to remedy situations where misapplications of valid state laws deprive people of their federal rights, the Court of Appeals majority mischaracterized what the Commissioner has been doing. It stated that the Commissioner's policy is that he "has conditioned his enforcement on his determining the claim would not be preempted by federal labor law." Pet. App. 12a. In another formulation, the Court of Appeals stated that the "Commissioner's position . . . is that enforcement not require the interpretation or application of a collective bargaining agreement. That condition is perfectly permissible under federal law." Pet. App. 11a. This statement is factually incorrect, because the Commissioner's policy was to deny its services to any employee covered by a collective bargaining agreement containing an arbitration clause, period. *See ante* at 10-12. It is also legally incorrect. Section 301 preemption does not occur whenever there is "interpretation or application" of a collective bargaining agreement. It only occurs "when a resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. This Court has specifically held that mere "application" of the terms of a collective bargaining agreement does not result in Section 301 preemption. *Lingle*, 486 U.S. at 413 n.12.

This case does not involve "random and unauthorized departures from otherwise unimpugned and established state procedures." *Cf. Zinermon*, 494 U.S. at 140 (O'Connor, J., dissenting). At issue in this case is the Commissioner's statewide, established procedure of not enforcing *any* claims by

employees who are covered by collective bargaining agreements containing arbitration. The policy itself is defective. *Cf. Monell*, 436 U.S. at 694. Livadas was only one of its victims, although hers is a good example because no thinking application of federal preemption law could have resulted in the conclusion that her claim was preempted. Nor is this a case of a mere "misapprehension of the boundary between state and federal power" or the "State's quite innocent mistaken judgment respecting the shifting boundary between two sovereign powers." *Cf. Dennis* v. *Higgins*, 498 U.S. 439, 451 (1991) (Kennedy, J., dissenting). After *Metropolitan Life*, *Fort Halifax* and *Lingle*, no doubt remained that state minimal labor standards laws are not preempted. The Commissioner's *real* policy, as he has admitted it to be, makes no attempt whatsoever to incorporate the principles of these cases into even a rough test for field application. Instead, he continues to use a test which is based solely and entirely on whether an employee has exercised her rights under the NLRA.

Ironically, the result of granting Livadas the relief she seeks in this case would be to *free* California officials to fully implement the State's longstanding minimal labor standards. Enforcement of these standards on behalf of all California employees has only been interrupted by the Commissioner's false notions of the limits imposed upon him by federal labor preemption.

VII. NO REASON EXISTS FOR FEDERAL COURTS TO ABSTAIN AND TO RELEGATE LIVADAS TO STATE COURT PROCEEDINGS

A. The Court of Appeals Decided That Abstention Was Necessary, Without Mentioning Or Applying Abstention Doctrine

The Court of Appeals held that Livadas should have been relegated to state court remedies, namely, a petition for writ of mandamus to compel the Commissioner to take her claim. Pet. App. 12a. By reversing the District Court on these

grounds, the Court of Appeals effectively held that the District Court should have abstained from exercising its §1983 jurisdiction. The court did not mention the abstention doctrine, however. Instead, it invented a novel approach to the subject, without referring to *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) or *Younger* v. *Harris*, 401 U.S. 37 (1971) and without applying any of the principles of either branch of abstention analysis.

Livadas brought this action after the Commissioner summarily refused to take action on her claim without a hearing under Cal.Lab.Code §98(a). No proceedings were pending at the state level, let alone judicial proceedings. No state-law issues were involved, only the Commissioner's interpretation of the limits of his authority under federal law. There is no special state tribunal in either theory or practice which is specially concerned with working out how the California Labor Commissioner should perform his duties within the confines of federal labor law preemption. In fact, the only judicial proceeding the Court of Appeals was able to envision was the extraordinary writ of mandamus. Under established abstention analysis, not a single reason existed for the Court of Appeals' conclusion that abstention was appropriate in this case. Its refusal to allow the District Court to exercise its §1983 jurisdiction in this case was nothing less than an abnegation of the responsibility of the federal judiciary to exercise its jurisdiction given by Congress. *Cf. New Orleans Public Service*, 491 U.S. at 359.

The federal courts have the duty to exercise their jurisdiction, and the situations in which abstention is permissible have been carefully defined by this Court. *See New Orleans Public Service*, 491 U.S. at 359. Abstention remains "'the exception, not the rule.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). *Burford* and *Younger* v. *Harris* define the two situations in which abstention is allowed.

B. No Abstention Is Appropriate Under *Burford*

The Court has defined the "*Burford* doctrine" in *New Orleans Public Service*, as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' [cit. om.]

491 U.S. at 361. None of these conditions exists here. ". . . *Burford* is concerned with protecting state administrative processes from undue federal interference. . . . " *Id.*, at 362. There is no such process here. There is only the extraordinary writ of mandamus. Cal.Code.Civ.Pro. §1085 provides:

> It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Unlike the tribunals with specialized knowledge in *Burford* and *Alabama Pub. Serv. Comm'n* v. *Southern R.R. Co.*, 341 U.S. 341 (1951), traditional mandamus[17] is a remedy gener-

[17] California law does provide for judicial review of adjudicatory decisions of state agencies through the writ of "administrative mandamus" Cal.Code Civ.Pro. §1094.5. But administrative mandamus will not lie unless the agency decision was "made as a result of a proceeding in which by law a hearing is required to be given. . . ." *Saleeby* v. *State Bar of California*, 39 Cal.3d 547, 560-61, 216 Cal.Rptr. 367, 374 (1985) A state agency's dismissal of an employment complaint without a hearing or taking of evidence may not be challenged through administrative mandamus. *See Mahdavi* v. *Fair Employment Practice Div.*, 67 Cal.App.3d 326, 333-334, 136 Cal.Rptr. 421, 424 (Cal.Ct.App. 1977).

ally available from any court of general jurisdiction, to remedy a wide range of acts, including those of private persons. Mandamus may be used for challenging the constitutionality or validity of statutes or official acts. *See Wenke* v. *Hitchcock*, 6 Cal.3d 746, 751, 100 Cal.Rptr. 290, 293 (1972). This power, however, has nothing to do with the nature of the claim or any specialized body of regulatory knowledge; it is universally available to all persons for all constitutional claims. If the federal courts had to abstain in deference to state courts' mandamus power, no federal court could ever issue a §1983 injunction against any state actor.

Moreover, proceedings in mandamus are limited. The California courts treat the Commissioner's decision as to which Labor Code to pursue as an unreviewable exercise of prosecutorial discretion. *See Painting & Drywall Work Preservation Fund, Inc.* v. *Aubry*, 206 Cal.App.3d 682, 686-87, 253 Cal.Rptr. 776, 777-78 (Cal.Ct.App. 1988). This treatment is similar to the way federal law treats the refusal of the General Counsel of the NLRB to proceed on an unfair labor practice charge. *Cf. NLRB* v. *United Food & Commercial Workers, Local 23*, 484 U.S. 112, 125-26 (1987). In both cases, the agency's refusal to proceed on a charge is not considered adjudicatory unless a formal hearing has been held. *Cf. id.* As with the General Counsel of the NLRB, the Commissioner's prosecutorial decision not to take further action prior to a hearing is judicially unreviewable. *Compare id. with Painting & Drywall*, 253 Cal.Rptr. at 777-78.

Beyond the nature of the state court proceedings that would be available here, which are far from adequate and do not involve any "state efforts to establish a coherent policy

with respect to a matter of substantial concern," the remaining reason for exercising *Burford* abstention is also absent. There are no "difficult questions of state law bearing on policy problems of substantial public import." All the questions involved here are federal ones. The only reason why the Commissioner has failed to enforce California law is his mistaken belief that *federal* labor law preemption prevents him from doing so whenever employees are covered by a collective bargaining agreement with an arbitration clause. The reason given by the Commissioner for rejecting Livadas's claim was not some fact specific interpretation of the California law, such as whether Livadas could afford to employ counsel or whether Safeway acted "willfully" when it failed to pay her upon termination. The Commissioner's only reason for refusing to help Livadas, as he has stated repeatedly, was based on notions of what federal preemption required.

C. No Abstention Is Appropriate Under *Younger*

The *Younger* v. *Harris* abstention doctrine also did not provide any grounds for the Court of Appeals' decision. First of all, *Younger* preemption applies where there are *pending* state proceedings. *See Younger*, 401 U.S. at 45; *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986). There were no pending state proceedings here, of any sort. The Commissioner simply refused to take Livadas's claim, and there were no further state proceedings. *Younger* does not require abstention to a mandamus proceeding in state court, because "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service*, 491 U.S. at 368.

Furthermore, federal courts may not abstain in favor of state-law administrative proceedings that are not judicial in nature. *See New Orleans Public Service*, 491 U.S. at 369-70. If state law does not regard an administrative proceeding as judicial, then

the federal courts should not abstain. *See Hawaii Housing Authority*, 467 U.S. at 237-39. California law does not regard proceedings before the Labor Commissioner as judicial, even where the agency conducts formal hearings on a complaint. *See Triad Data Services, Inc.* v. *Jackson*, 153 Cal.App.3d Supp. 1, 14-15, 200 Cal.Rptr. 418, 426 (Cal.App.Div. 1984). "[T]he Labor Commissioner is a 'purely administrative officer with state-wide authority and possesses no judicial powers . . . '" *Id.*, 200 Cal.Rptr. at 426. In this case, there was certainly no adjudicatory proceeding on Livadas's claim. Prior to the February 7, 1990 no-action letter, the agency did not conduct any adversary proceedings, hold an evidentiary hearing, nor require service of process or an appearance by Livadas's employer. Livadas's only communication with the agency was her one-page intake report, J.A. 18; her only opportunity to discuss her union contract was her check-mark "Yes" to the form question "Was your job union?" *Id.*[18]

The Court of Appeals' deference to the California courts' mandamus remedy is also inconsistent with *Golden State*. The federal plaintiff in *Golden State* had a mandamus remedy in state court for the Los Angeles City Council's denial of its franchise renewal application.[19] Unlike Livadas, the taxicab

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[18] The Commissioner cannot camouflage his agency's exclusion policy by labelling it a "*sua sponte* dismissal on jurisdictional grounds." Brief in Opp. to Pet. at 12. The agency refused to proceed, not because of the unique facts of Livadas' complaint, but because of the agency's categorical rule excluding any claimant covered by a standard union contract. In effect, the Commissioner's enforcement policy imposes an "irrebuttable presumption" against such claimants. If that irrebuttable presumption penalizes the federal rights of state-law claimants, the federal courts must exercise §1983 jurisdiction to protect federal rights from the operation of the invalid state-law rule. *See D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 487 (1983).

[19] The California courts have the power of administrative mandamus over local governments' decisions on applications for municipal franchises and licenses. *See Sierra Club* v. *City of Hayward*, 28 Cal.3d 840, 848-49, 171 Cal.Rptr. 619, 622-23 (1981); *City of Fairfield* v. *Superior Court*, 14 Cal.3d 768, 773 n.1, 122 Cal.Rptr. 543, 545 n.1 (1975).

company in *Golden State* received a hearing before the City Council before its application was denied. If the Court of Appeals was correct to insist that Livadas seek a traditional writ of mandamus, then the courts in *Golden State* should have required the taxicab company seek a writ of mandamus in the California courts to review the City Council's denial of its renewal application. It would be inconsistent to refuse federal relief to a §1983 plaintiff like Livadas, when the same remedy has been granted to the federal plaintiff in *Golden State*.

The Court of Appeals distinguished *Golden State* by reasoning that the City Council had explicitly defined an invalid condition on the franchise, while here the Commissioner only places the formally valid condition that Livadas's claim not be preempted by federal law. Pet. App. 10a-12a. This is not a durable distinction, because the Commissioner's policy is admittedly something different: that the claimant has not exercised her NLRA rights to negotiate through her representative a collective bargaining agreement containing arbitration. *Ante*, at 10-12. In this case, the Commissioner's policy is demonstrably invalid, despite his subjective belief that he is only following the dictates of preemption law. If the Commissioner can insulate his agency's policy from federal injunctive relief just by claiming mistaken fidelity to a general principle of law, then any state agency could use the same tactic to avoid a federal injunction.

For example, the City of Los Angeles could permissibly enact a city ordinance forbidding municipal franchises to be awarded in a way that would "interfere with the balance of power in a labor dispute." So long as the City professed to be applying this "perfectly valid" labor neutrality law to each employer's application, it could circumvent *Golden State* easily. The Court of Appeals' abstention rule would prevent the federal courts from interfering with the City's application of its facially valid local preemption law, even if its policy systematically barred applicants based on its skewed notion of labor preemption. This result would severely undermine the uniformity of federal labor law.

VIII. CONCLUSION

The judgment of the Court of Appeals should be reversed. This Court should reinstate the declaratory and injunctive relief ordered by the District Court, Pet. App. 49a-50a.

Before the Court of Appeals, Livadas stipulated that paragraphs 4 and 6 of the District Court's injunction, Pet. App. 49a-50a, may be deleted.[20] The remaining provisions of the District Court's injunction, at paragraphs 1-3, 5 and 7, should be reinstated by this Court.

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[20] Paragraph 4 of the District Court's order, Pet. App. 49a, orders the Commissioner to institute an action in the California state courts. Livadas concedes that the Commissioner may institute administrative proceedings to test the factual validity of Livadas's claim prior to instituting such an action. Livadas also acknowledges that paragraph 6 of the District Court's injunction, Pet.App. 49a, may contravene the Eleventh Amendment of the U.S. Constitution by requiring a state agency to pay compensatory damages. The remaining sections of the District Court's injunction do not offend the Eleventh Amendment, because they constitute declaratory and injunctive relief against a state agent in his official capacity. Such relief which does not violate the Eleventh Amendment, *see Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Quern* v. *Jordan*, 440 U.S. 332, 346-349 (1979).

STATUTORY APPENDIX

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. §173(d) provides in relevant part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Civil Rights Act of 1871, 42 U.S.C. §1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District

> of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Cal.Code Civ.Pro. §1084 and 1085 provide:

> §1084.
> The writ of mandamus may be denominated the writ of mandate.
>
> §1085.
> It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Cal.Lab.Code §90.5(a) provides:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Cal.Lab.Code §98(a) provides in relevant part:

> The Labor Commissioner shall have the authority to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction . . . . Within 30 days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. . . .

Cal.Lab.Code §98.3(a) provides in relevant part:

> The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable. . . .

Cal.Lab.Code §201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal.Lab.Code §203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of

> an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal. Lab. Code §229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.